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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1687

ABRAHAM RODRIGUEZ,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

Page

Table of Authorities ii

Statement of Facts 1

Point I: THE INDICTMENT WAS LEGALLY SUFFICIENT 5

Point II: PETITIONER'S RETRIAL WAS NOT BARRED BY THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY 7

Conclusion 12

TABLE OF AUTHORITIES

Page

CASES:

Burks v. United States, 437 U.S. 1 (1978) 7,8,9

Greene v. Massey, 437 U.S. 19 (1978) 7,8

Illinois v. Somerville, 410 U.S. 458 (1973) 11

People v. Alvarez, 88 Misc.2d 709, 389 N.Y.S. 2d 980 (Sup.Ct. N.Y.Co. 1976), *affd.* 78 A.D.2d 592 (1st Dept. 1980) 5

People v. Bliven, 112 N.Y. 79, 19 N.E. 638 (1889) 5,6

People v. Henry, 18 A.D.2d 293, 239 N.Y.S.2d 146 (4th Dept. 1963) 6

People v. Katz, 209 N.Y. 311, 103 N.E.2d 305 (1913) 5

People v. Wilcznski, 97 Misc.2d 307, 412 N.Y.S.2d 239 (Sup. Ct., N.Y.Co. 1977), *cert. denied*, 439 U.S. 1128 (1978) 5,7

Tibbs v. Florida, 457 U.S. 31, 41 (1982) 9

United States v. Tateo, 377 U.S. 463, 466 (1964) 12

TABLE OF AUTHORITIES (cont'd.)

Page

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend. 6 7

NEW YORK STATE STATUTES:

Criminal Procedure Law § 200.90 7

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENT

The People of the State of New York hereby replies to the Petition of Abraham Rodriguez for a Writ of Certiorari to review an Order of the Appellate Division, Supreme Court, Fourth Judicial Department.

STATEMENT OF FACTS

On August 16, 1978, a fire substantially destroyed a building located in the Village of Lyons, County of Wayne. Shortly thereafter, one Harold Mann contacted the authorities, stating that it was he who started the fire. A bullet had shattered one of the windows of a car Mr. Mann was driving one evening, frightening Mann to the point of seeking police assistance.

Mann's initial contact was with the Wayne County Public Defender, who advised Mann to "turn himself in." Mann surrendered to the Wayne County Sheriff, and cooperated with Detective Lieutenant Piscotti. Mann informed the Lieutenant of his involvement with the August 16, 1978 fire, and implicated the Petitioner, Abraham Rodriguez, as the one who had solicited the act for money. Lieutenant Piscotti contacted the Federal Bureau of Investigation, which dispatched two special agents to assist in the investigation. Specifically, the plan was to conceal a tape recorder on Mann, who would engage the suspect, Rodriguez, in conversation. It was hoped that the tape recordings would provide the evidence necessary to corroborate Mann's statements implicating Rodriguez.

There were two separate instances of recorded conversations. The first occurred on September 8, 1978. Early that day, Lieutenant Piscotti met with two special agents at the F.B.I. offices in the City of Geneva. All three then met Mann at a Motel near the Geneva Exit of the New York State Thruway. Special Agent Coyne was trained in electronics and was assigned to assist Piscotti and Agent Puckett in "wiring" Mann. Mann had, some days earlier, met with Special Agent Puckett at the F.B.I. offices in Geneva to discuss the recording process. Special Agent Coyne placed two devices on Mann's person; one was a transmitter permitting the agents to overhear any conversation over their car radio; the other device was a tape recorder simultaneously recording the same conversation. After these devices were securely affixed and concealed on Mann's person, the Lieutenant and Special Agent Coyne, in one vehicle, and Mann in another, traveled to the Village of Lyons. The two police officers deployed themselves a short distance from the residence of Rodriguez on Water Street, where Mann and Rodriguez had agreed to

meet that day at 12:00 noon. Mann went into the residence and engaged in conversation with Rodriguez, which was tape recorded. The discussion centered around Rodriguez's disappointment that his and Mann's earlier plan did not come to complete fruition, as the August 16, 1978 fire had not destroyed certain records in the Villani building. Rodriguez wished certain records destroyed that related to proceedings the Village of Lyons had instituted against certain property owners on Water Street for Building Code violations. Rodriguez agreed to pay Mann some more money to "finish the building." Rodriguez stated that he "didn't want nobody to know that I'm paying you. I don't wanna." Rodriguez also expressed concern that the authorities were aware "we're doing it." Rodriguez agreed to pay Mann $45.00 to finish the Villani building at the Big M Supermarket in the Village of Lyons, which exchange took place shortly thereafter. Mann drove back to the Thruway Motel near Geneva and gave the tape recording equipment and the $45.00 to the F.B.I. agents.

Less than one week later, Mann and the police authorities engaged in another recording of conversations between Mann and Rodriguez. On September 15, 1978, Special Agents Coyne and Puckett met Mann in Geneva where the recording and transmitting devices were again concealed upon Mann's person. Mann and the police authorities traveled to Lyons where Mann met Rodriguez in a parking lot in front of the Eastern Farm Worker's Association on Water Street. Again, Mann and Rodriguez discussed their criminal pursuits. Once this last taping session was completed, Rodriguez was arrested by the Wayne County Sheriff upon a felony complaint and thereafter indicted by the Wayne County Grand Jury.

A four day Jury Trial was held before the Honorable Harold J. Stiles, Wayne County Judge, in May of

1979. On May 18, 1979, after deliberating for some three hours, the jury returned the verdict finding Rodriguez guilty of Arson in the Second Degree. At trial, testifying under a grand immunity, Mann told of how he had known Rodriguez for approximately two years prior to August of 1979. On July 27, 1979, the day after a fire at the Baltzel Hotel in Lyons, Mann had a discussion with Rodriguez concerning a building owned by the Lyons Village Attorney, Anthony J. Villani. Rodriguez told Mann that he wanted Mr. Villani's building destroyed along with certain "eviction records" he believed were located there. These records related to proceedings brought by the Village against owners of certain buildings adjoining Water Street in the Village. Rodriguez requested Mann to burn the building down and offered Mann $200.00 for his services: $100.00 for destruction of the building, and another $100.00 for destruction of the "eviction records." Rodriguez indicated that his primary interest was in the destruction of the records. After the bargain was struck, the discussion turned to the possibility of a woman living in the building. Rodriguez asserted that there was no woman residing in the building. The next day, however, Mann discovered that a woman did, indeed, live in the building. Mann sought Rodriguez's counsel on how to handle this problem. Rodriguez directed: "try to scare her out of the building, but destroy it anyway."

On August 16, 1978, Mann implemented his part of the bargain. He went to the building and first tried to scare the woman resident out of the building by making noise. The woman stirred briefly, but did not leave her residence. Mann then started the fire using a plastic container of gasoline and kerosene. The woman was eventually rescued by the Lyons Fire Department, which was called to the scene.

The jury verdict convicting Rodriguez was reversed by the Appellate Division, Fourth Department, because of an insufficient foundation for admission of the corroborating tape recordings. The court directed a new trial, which was held in March and April of 1981. On April 3, a Supreme Court Jury, after ten days of trial proceedings, again found Rodriguez guilty of Arson in the Second Degree. Rodriguez appealed this conviction to the Appellate Division, which affirmed, but directed modification of the sentence. Rodriguez sought, but was denied, leave to appeal to the New York Court of Appeals.

POINT I

THE INDICTMENT WAS LEGALLY SUFFICIENT

Petitioner invokes the well-worn argument that an indictment must specify that the defendant acted as an accessory before the fact if such is the theory for criminal liability. In New York:

> It has long been held that an indictment need not specify that the defendant solicited, requested, commanded, importuned, or intentionally aided another in the commission of the crime charged. 'It is sufficient that the indictment charged him as a principal in the words of the statutes proscribing the conduct.'

People v. Wilcznski, 97 Misc.2d 307, 412 N.Y.S.2d 239 (Sup. Ct., N.Y.Co. 1977), *cert. denied,* 439 U.S. 1128 (1978), *citing People v. Alvarez,* 88 Misc.2d 709, 389 N.Y.S.2d 980 (Sup. Ct., N.Y.Co. 1976), *affd.* 78 A.D.2d 592 (1st Dept. 1980); *People v. Katz,* 209 N.Y. 311, 103 N.E.2d 305 (1913); *People v. Bliven,*

112 N.Y. 79, 19 N.E. 638 (1889); *People* v. *Henry*, 18 A.D.2d 293, 239 N.Y.S.2d 146 (4th Dept. 1963).

In an exhaustive and still cited opinion of the New York Court of Appeals in 1889, Judge Peckham concluded:

> By holding this indictment [accusing the defendant in the language of a principal] to be insufficient to admit proof of the defendant's guilt, by reason of his procuring and advising the act to be done instead of doing it himself, we think we should be taking a step backwards in regard to the proper rules which should obtain in criminal pleadings.

People v. *Bliven, supra,* at 92-93. Judge Peckham noted and answered the argument raised by the Petitioner in the instant case - that the indictment insufficiently apprises the defendant of the nature of the criminal acts charged:

> The only objection that could be urged against an indictment in this form [of accusing the defendant in the language of a principal] is the possibility of misleading the Defendant as to the nature or character of the act of which he is accused. It was that objection that seemed so weighty in the eyes of that most learned and able Judge, Chief Justice Marshall, as we learn from his views expressed upon that point in the trial of Aaron Burr for treason, although at the same time, he admitted the existence of the rule. (4 Cranch, 469, 497).
>
> But upon reflection we think the objection is more fanciful than real, and if it be understood that upon an indictment of this nature a man may be convicted upon proof, not only of his doing the act with his own hand, but upon proof, that

> he advised and procured another to do it, and thus did it himself, we think no man will suffer any real inconvenience or any injustice from such a rule.

Id. at 92. Modern authorities add:

> If a Defendant [is] uncertain as to the theory of criminal liability for which he [is] indicted or if he desire[s] any greater specificity, his remedy [is] a motion for a bill of particulars. . .Removing ambiguity which prevents a Defendant from preparing or conducting a defense is the very purpose of a bill of particulars. (PL 200.90; Ann. 5 ALR 2d 444). Where a bill of particulars is necessary to provide the Defendant with a plain and concise factual statement of the charges against him, it will be granted.

People v. Wilczynski, supra, at 309-10.

Given the long pedigree and well-reasoned basis for the rule sustaining an indictment charging an accessory before the fact, as a principal, no violation of Petitioner's Sixth Amendment rights occurred.

POINT II

PETITIONER'S RETRIAL WAS NOT BARRED BY THE CONSTITUTIONAL PROHIBITION AGAINST DOUBLE JEOPARDY

The double jeopardy issue raised by the petitioner presents the question reserved by this Court in *Greene v. Massey,* 437 U.S. 19 (1978), decided the same day as *Burks v. United States,* 437 U.S. 1 (1978). *Burks* stands for the proposition that a defendant cannot

be subjected to a second trial after his conviction is reversed due to insufficient evidence. Carefully distinguished from reversals based solely upon evidentiary insufficiencies are reversals based on trial error:

> In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., *incorrect receipt* or *rejection of evidence,* incorrect instructions, or prosecutional misconduct. 437 U.S. at 15. (emphasis added).

In the instant matter, Petitioner Rodriguez's conviction was reversed on the grounds of trial error, i.e., the trial judge admitted certain tape recordings into evidence without sufficient foundation. Neither the trial court nor the intermediate appellate court found the tape recordings insufficient evidence to corroborate the accomplice's testimony as required by State law. So circumstanced, the case is markedly different from that found in *Burks* where the prosecution failed to secure the admission of proof necessary to convict. It is simplistic to argue that a trial court's error in admitting concededly essential evidence is tantamount to a prosecutional failure to present such evidence at all.

Correctly framed, Petitioner's real point is that raised but left unanswered in *Greene* v. *Massey,* 437 U.S. 19 (1978). *Greene's* principal holding is that the constitutional prohibition against double jeopardy is fully applicable to state criminal proceedings, including the rule announced in *Burks.* The case was

remanded to the Court of Appeals because of unclarity in the opinion of Florida Supreme Court in reversing Petitioner's conviction. One construction of the Florida Supreme Court's reversal was:

> that the *legally competent* evidence adduced at the trial was insufficient to prove guilt. That is, they were of the opinion that once the inadmissable hearsay evidence was discounted, there was insufficient evidence to permit the jury to convict. 437 U.S. at 18. (emphasis in original).

Because of the remand, this Court "express[ed] no opinion as to the double jeopardy implications of a retrial following such a holding." 437 U.S. at 18 n.9.

If this Court were now to entertain this question, it is clear that this gloss upon the *Burks* rule is unnecessary to effectuate double jeopardy policies. Moreover, it would require the prosecution to bear the entire risk of trial error, thus obliterating the *Burks* distinction between insufficient evidence reversals and trial error reversals. In *Tibbs v. Florida,* 457 U.S. 31, 41 (1982), this Court stated:

> [T]he exception recognized in Burks and Green rests upon two closely related policies. First, the Double Jeopardy Clause attaches special weight to judgments of acquittal. A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial. A reversal based on the insufficiency of the evidence has the same effect because it means that no rational factfinder could have voted to convict the defendant.

> Second, Burks and Green implement the principal that "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Burks, supra, at 11. This prohibition, lying at the core of the Clause's protections, prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance. For this reason, when a reversal rests upon the ground that the prosecution has failed to produce sufficient evidence to prove its case, the Double Jeopardy Clause bars the prosecution from making a second attempt at conviction.

As to the first policy, it is clear, in the light of the court's ruling to admit the tape recordings at Petitioner's first trial, that sufficient evidence was before the jury to enable a "rational factfinder" to convict. As to the second policy, the case for the prosecution at the second trial mirrored that presented at the first. Of course, the prosecution was careful to cure the defect in the admission of the tape recordings. That is, the prosecution laid the proper foundation through the testimony of a participant in the recorded conversations rather than through testimony of monitoring police authorities. At the first trial, the participant, Harold Mann, testified concerning his relationship with the Petitioner. The prosecution did not attempt to elicit testimony from

Mann concerning the accuracy of the tapes, but relied on the testimony of the monitoring police authorities.* Had the trial judge rejected the proffered tape recordings for the reasons stated by the intermediate appellate court, the prosecution would have recalled Mann to the stand for additional testimony. It was not a case where the prosecution was unable to muster sufficient proof at the first trial; rather, the prosecution acted in accordance with the ruling of the trial judge that the testimony of the monitoring police authorities provided a proper foundation.

Lastly, were this Court to hold that every trial error resulting in the improper admission of critical evidence perforce results in dismissal of criminal indictments upon appellate reversal, prosecutors throughout the Nation would be placed in an untenable position. Prosecutors should not complain when cases are dismissed because sufficient evidence was not adduced to support conviction. At the same time, however, prosecutors should be entitled to respect a trial court ruling on the admissibility of evidence, and not be forced out of caution to "cover all bases" by offering the same evidence again and again under alternative evidentiary methods.

This Court has recognized that, "a criminal trial is, even in the best of circumstances, a complicated affair to manage." *Illinois v. Somerville,* 410 U.S. 458 (1973). And it has further noted that, "[i]t would be a high price indeed for society to pay were every

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* As a matter of trial strategy, it was felt, given the complicity of Harold Mann, that testimony of the monitoring police authorities as to the accuracy of the tape recordings was the preferable method of providing a foundation for admission of the tapes.

accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States v. Tateo,* 377 U.S. 463, 466 (1964). Because a new trial was necessitated out of trial error, as distinguished from evidentiary insufficiency, the Petitioner's double jeopardy rights were not violated.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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